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No._____

In the Supreme Court of the United States

October Term, 1983

FRANCES WAMBHEIM and CATHERINE HEGGELUND, individually and on behalf of all women similarly situated,
Petitioners,

vs.

J. C. PENNEY COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
BRIEF FOR PETITIONERS

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November, 1983

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

QUESTIONS PRESENTED

1. May an employer justify as a business necessity the disparate impact upon married female employees caused by its "head of household" rule that an employee must earn more than his or her spouse to obtain spousal coverage under the employer's medical plan by proof that without the rule the cost of medical benefits to spouses of its female employees would be six to ten million dollars per year?

2. What standard of proof is required of an employer to justify a practice which has the following disparate impact: (a) exclusion of 87.5% of its married female employees but only 10% of its married male employees from spousal medical coverage under the employer's medical plan; and (b) payment of more benefits on the average to male employees and their families than to female employees and their families?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

Frances Wambheim and Catherine Heggelund, individually and on behalf of all women similarly situated, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the decree of the United States District Court for the Northern District of California.

ORDERS AND OPINIONS BELOW

Pursuant to Rule 21 (k), the following orders and opinions are attached in the appendix to this petition:

i) The opinion of the Court of Appeals for the Ninth Circuit, *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492 (May 17, 1983), which is the decision for which review is sought. (Appendix A)

ii) The order of the Court of Appeals for the Ninth Circuit denying Petitioners' petition for a rehearing, dated August 15, 1983. (Appendix B)

iii) The memorandum of decision of the District Court in favor of respondent, *Wambheim v. J. C. Penney Co., Inc.* No. C 75 2486 (N.D.Cal. Feb. 12, 1982 (Appendix C).

iv) The first opinion of the Court of Appeals in this matter, *Wambheim v. J. C. Penney Co., Inc.*, 642 F.2d 362 (9th Cir. 1981), reversing an award of summary judgment to Respondent entered by the District Court on May 4, 1979. (Appendix D)

v) The District Court's Memorandum and Order Granting Respondent Summary Judgment dated May 4, 1979, 19 E.P.D. ¶9232 (N.D.Cal. 1979). (Appendix E)

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1983. The order denying Petitioners' petition for rehearing was entered on August 15,1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l).

STATUTE AND REGULATION INVOLVED

The relevant provisions of Section 703 of title VII of the Civil Rights Act, as amended (42 U.S.C. §§2000e, et seq.) are as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.
>
> 42 U.S.C. 2000e-2(a)

The relevant portions of the EEOC Sex Discrimination Guidelines, 29 C.F.R. §1604.9, are as follows:

> (c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that

> "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act.
>
> 29 C.F.R. 1604.9 (c)

> (e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.
>
> 29 C.F.R. 1604.9(e)

STATEMENT OF THE CASE

Petitioner Frances Wambheim filed this action on November 25, 1975, as a class action seeking relief under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 from sexual discrimination in the employment practices of Respondent J. C. Penney Company, Inc. (hereinafter Penney or Respondent). Petitioner Catherine Heggelund subsequently intervened. Petitioners allege that Penney has been and is in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., by the implementation and enforcement of its rule that in order to enroll a spouse for coverage in the Penney medical and dental plan, a Penney employee must qualify as "head of household"; that is, the employee must earn more than his or her spouse.

Petitioners' claim that the "head of household" or relative earnings rule violates Title VII And the Equal Pay Act of 1963 arises from overwhelming disparate

impact upon married women: the rule prevents 87.5% of Penney's married women from obtaining spousal coverage but permits all but about 10% of Penney's married men to obtain spousal coverage; and the rule results in payment to male insured units of more benefits on the average than to female insured units.[1] Further, a married person (usually a woman) who is unable to insure a spouse because the spouse earns more must pay as much in premiums to insure herself and two children as a head of household pays to insure himself, a wife and children.

Federal jurisdiction was predicated upon §706f of Title VII of the Civil Rights Act of 1964 [42 U.S.C. §12000e-5(f)].

On May 4, 1979, the District Court granted Respondent summary judgment, holding that individual eligibility for enrollment in the medical plan is determined on a case by case basis through an objective test of comparing the individual's income with that of the spouse, that income is a gender neutral "factor other than sex" and is therefore not violative of Title VII or the Equal Pay Act. *Wambheim v. J. C. Penney Co., Inc.*, 19 E.P.D. ¶9232 (N.D.Cal. 1979). (Appendix E)

The Court of Appeals for the Ninth Circuit reversed the award of summary judgment, holding that petitioner had established a prima facie case of illegal discrimina-

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[1]A male insured unit is an insured male Penney employee and includes any family member covered by him. A female insured unit is an insured female Penney employee and includes any family member covered by her. As shown below, male insured units usually include a wife while female insured units rarely include a husband.

tion on account of sex and remanded the matter for trial. *Wambheim v. J. C. Penney Co., Inc.*, 642 F.2d 362 (9th Cir. 1981). (Appendix D) Following trial in January, 1982, the District Court entered judgment for Respondent, holding that the head of household rule was justified by Respondent's business reasons: Respondent's conclusion that its employees, dependent children and its employees' spouses with lower earnings should be the objects of Penney's concern and bounty; that Penney employees' higher earning spouses are more likely already to have medical coverage from their own employers or be able to afford such coverage; and that cost to its employees should be kept as low as possible so as to provide coverage for those who really need and deserve it.

The District Court further held that the foregoing defenses were not barred by this Court's decision that the cost of providing benefits to females may not serve as justification for discriminating against them. *City of Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 716-717 & n.32. The District Court held that "unless the cost justification is a mere pretext for discrimination against women under general Title VII standards, costs may be a relevant consideration in business decisions to deny benefits to a certain class which are in no way gender based." *Wambheim v. J. C. Penney Co., Inc.* No. C 75 2486 (N.D.Cal. Feb. 12, 1982). (Appendix C)

In affirming the District Court, the Ninth Circuit held, *inter alia*, that since Petitioners had established a

prima facie case of discrimination, the burden shifted to Penney to justify its policy by demonstrating that *legitimate and overriding business considerations provide justification.* The Court held that the foregoing standard of proof was met by Respondent's explanation that the rule was designed to benefit the largest number of employees and those with the greatest need; that dependent children and spouses covered under the head of household rule have the greatest need for dependent coverage; that qualifying spouses are less likely to have other medical insurance; that Respondent seeks to keep the costs of the plan to its employees as low as possible so that the needy can afford coverage; and that if all spouses are included, the contribution rates would increase. *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495 (1983). (Appendix A)

Further, the Ninth Circuit permitted the cost defense, contrary to this Court's decision in *Manhart, supra:*

> *Manhart* is not controlling here. Penney has offered legitimate and overriding business justifications for adoption of its head of household rule. *Cost undoubtedly was a factor considered in the process, as it will be in structuring any employee benefits plan. Manhart* does not require the conclusion that the neutral policy adopted violates Title VII, when it is justified by independent legitimate business considerations. *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495. [Emphasis added.]

On August 15, 1983, the Court of Appeals denied Petitioners' Petition for Rehearing (Order, Appendix B).

Petitioners' Prima Facie Case

The evidence introduced by Petitioners to establish a prima facie case consisted primarily of statistical evidence of disparate impact of the head of household rule on married females and of the consequent disparate distribution of medical benefits paid to males.

Petitioners evidence showed that for 16 years (1955 until 1971), Respondent openly discriminated against its married female employees by prohibiting them from enrolling their spouses in the company medical insurance plan. In 1971, Respondent abandoned its policy of overt discrimination against women and adopted a facially neutral rule which allows an employee who qualifies as head of household to enroll his or her spouse in the medical plan. "Head of household" is defined as follows:

> You are considered "head of household" when you provide more than 50% of the total earnings for you and your spouse. Earnings do not include income from stocks, bonds, savings accounts, real estate, disability benefit payments, social security, or pensions . . .

Any Penney male who did not qualify under the new rule was protected by a grandfather clause which provided that any employee (necessarily male) who prior to February 1, 1971 had insured his spouse would not have to meet the "head of household" test.

Adoption of the facially neutral head of household rule in 1971 did not significantly change the denial of spousal medical coverage to female employees under prior Penney plans. Within the 34 stores included in the class action, there were 432 married males and 1,653 married females eligible for medical plan enrollment. Of these employees, 345 married males had medical coverage, of whom 314 (91%) had dependent medical coverage. On the other hand, 781 married females had medical coverage, of whom only 294 (37.6% had dependent medical coverage.

Within Penney district 8566, which contained over 75% of all eligible employees within the 34 stores, the following statistics apply:

	Total Enrolled for Coverage	Total Eligible Heads of Household	Percent
Married Males	272	243	89.34%
Married Females	676	85	12.57%

Petitioners' evidence showed that 88 married females had coverage for themselves and children, but not for their spouse. Only six males were in this category. Under the Penney plan, these 88 women could have enrolled their spouses without incurring an additional premium cost; Petitioners' evidence showed that their failure to do so is explained only by their inability to qualify as heads of household.

In addition to the disparate exclusion of married females from obtaining spousal coverage, Petitioners' evidence showed that the head of household rule results

in more benefits being paid to male insured units than to female insured units:

MARRIED MALES

Employee and Spouse:	75 male insured units at $706 benefits per year
Employee, Spouse and Children:	163 male insured units at $932 benefits per year
TOTAL:	238 male insured units at $860 benefits per year

MARRIED FEMALES

Self Only	421 female insured units at $426 benefits per year
Self + Child:	78 female insured units at $469 benefits per year
Self + Children:	88 female insured units at $598 benefits per year
TOTAL:	587 female insured units at $457 benefits per year

Penney's Business Justification Defense

If Penney were to eliminate the head of household rule, enrollment of new spouses would cost Penney $6 million to $10 million nationally before taxes. The cost for the 34 stores included within this action would be from $100,000 to $150,000 before taxes. Since Penney is in approximately a 50% tax bracket, the actual cost to Penney ranges from $3 million to $5 million per year nationally and $50,000 to $75,000 for the stores involved in this action.

When Penney reviewed the medical plan in 1977 to determine the fiscal impact of removing the head of household rule, Penney considered the cost implications of removing the head of household rule and decided to continue with the rule.

Penney's evidence showed that if the plan were changed, the cost to employees might be increased and affect participation. However, Penney's witnesses acknowledged that Penney could have absorbed any increased costs and not passed them on to the employees.

Penney's principal witness testified that the head of household rule was fair in that it permitted Penney to provide benefits only to its employees and their eligible dependents; Penney did not feel a need to provide benefits to higher earning spouses who were perhaps covered by another plan. Penney only wanted to provide for the needy dependents of its employees.

Penney also explained that the head of household rule allows Penney to offer a comprehensive benefit program to its part-time employees and to attract good associates. There was no evidence whatsoever, however, that removal of the head of household rule would require Penney to terminate medical coverage for part-time employees or would prevent it from attracting good associates. The only evidence of the possible consequences of elimination of the rule was the evidence of cost.

Rebuttal of the Business Justification

Evidence offered to rebut the business necessity defense included the following:

Petitioners' evidence showed that needy dependents are not the only dependents covered under the plan. An unemployed wife with $100,000 *rental* income (not counted under the relative earnings test) can be enrolled for coverage under her husband's coverage even if the husband earns only $15,000. On the other hand, if the unemployed wife earns $15,001 from her job, she is not eligible even if she has no medical coverage at her place of employment. The relative earnings test does not select for need in such cases.

Petitioners' evidence showed that customarily costs of employee benefit packages (medical, dental, pension, profit sharing, cost of living adjustments, social security, sick pay and workers' compensation) are expressed in terms of cost as a percentage of gross payroll. Penney's benefit programs cost it less per payroll dollar than its competitor's packages; even if Penney were to increase its costs by eliminating the head of household rule, Penney would still pay less than its competitors:

1980 TOTAL BENEFIT PACKAGE AS PERCENT OF PAYROLL

	Penney Company	Penney's Competitors	
		Department Stores	Other Retail & Wholesale
Actual 1980	27.10%	31.10%	31.30%
Add $ 6 million cost	27.46%	—	—
Add $10 million cost	27.67%	—	—

If Penney had incurred $10 million additional costs (the high end of Penney's estimate) in 1980 by removing the head of household rule, the percentage of payroll allocated to medical-dental benefits would have increased from 3.21% to 3.78%. If the increase in cost had been only $6 million (the low end of Penney's estimate), then the percentage would have increased to 3.55%.

1980 MEDICAL-DENTAL COSTS AS PERCENT OF PAYROLL

	Penney Company	Penney's Competitors	
		Department Stores	Other Retail & Wholesale
Actual 1980	3.21%	3.20%	3.80%
Add $ 6 million cost	3.55%	—	—
Add $10 million cost	3.78%	—	—

REASONS FOR GRANTING THE WRIT

This Court should grant a Writ of Certiorari for two reasons:

1. The opinion of the Ninth Circuit permits employers to justify sex discrimination by proof that it saves money by discriminating. The cost justification defense has been disallowed by this Court's opinions in *Manhart, supra*, 435 U.S. at 716-717; *Arizona Governing Committee v. Norris*, ___U.S.___, at n.14, 77 L.Ed.2d 1236, 1248 at n.14, ___ S.Ct.___ (1983); and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, ___U.S.___, 77 L.Ed.2d 89, 103 at n. 26 (1983) (". . . no such [cost differential] justification is recognized under Title VII once discrimination has been shown.") The conflict between the Ninth Circuit and

this Court is clear and irreconcilable. Either cost is or it is not a permissible defense.

2. The opinion of the Ninth Circuit holds that in a disparate impact case discrimination may be justified by a standard of proof less stringent than "business necessity," *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971); "manifest relationship to the employment," *Connecticut v. Teal* 457 U.S. 440, 446 (1981) or "necessity for the efficient operation of business," *Dothard v. Rawlinson*, 433 U.S. 321 at 331 n.14 (1976).

Whether discrimination in a fringe benefit case is less onerous and therefore more easily justified than discrimination in a hiring case is an important question of federal law not yet settled by this Court.

The Cost Question

The Ninth Circuit attempted to distinguish the *Manhart* prohibition against the cost defense on the grounds that *Manhart* involved a facially discriminatory policy, whereas the present case involves a facially neutral policy with a discriminatory impact. No other court has found this to be a significant distinction. On the contrary, at least two circuits have rejected an analogous "cost justification" defense in disparate impact cases arising under the Age Discrimination in Employment Act, 29 U.S.C. 621, *et seq.*,[2] and held that employers may not cut costs by using policies with a markedly disparate impact on a protected group. *Leftwich v. Har-*

[2]The prohibitions in the Age Discrimination in Employment Act are taken in *haec verba* from Title VII. Cf. 29 U.S.C. 623 with 29 U.S.C. 2000e-2.

ris-Stowe State College, 702 F.2d 686, 691-692 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027, 1034 (2nd Cir. 1980), *cert. den.* (1981) 451 U.S. 945.

It cannot be disputed that the head of household restriction — like any other limitation on the number of employees eligible for benefits — saves Penney money by restricting the number of employees eligible to purchase medical coverage for their spouses. Conversely, it will cost something to remove that restriction and allow men and women to obtain spousal coverage on an equal basis. If such cost considerations are accepted as a justification for the head of household rule, then petitioners will never be able to obtain relief under Title VII from policies which effectively lower the salaries or benefits of female employees, no matter how severe the discriminatory impact may be. In fact, the more dramatic an effect on women's compensation a policy has, the more it would cost an employer to remove it and, under the Ninth Circuit's approach, the greater its justification for keeping it. Permitting employers to save money at the expense of female employees on the basis of a facially neutral policy cannot be reconciled with the objectives of Title VII any more than the use of explicitly sex-based pension or pregnancy benefits plans. Nothing in *Manhart, Arizona v. Norris*, or *Newport News* purports to limit the disapproval of a cost defense to a treatment or intentional discrimination case as opposed to an impact case.

This does not mean that an employer may not consider costs in establishing its health benefit plan. Nor

does it mean that an employer is required to provide any particular level of benefits. An employer is simply required to make the benefits it chooses to provide available to all employees on a nondiscriminatory basis. While it is legitimate for an employer to seek to minimize its health insurance costs, it may not accomplish this objective by making such benefits available to most male employees while withholding them from most women employees. Cf. *Franci v. Avco* 538 F.Supp. 250, 259 (D.Conn. 1982) (economic necessity explains decision to lay off employees, but does not justify selection of employees for layoff in a discriminatory pattern). Thus, the cost savings occasioned by denying spousal benefits to all but 12% of Penney's female employees, while providing these benefits to almost 90% of its male employees, cannot be a justification for the discriminatory head of household rule.

The Standard of Proof Question

The Ninth Circuit held that the traditional standards of "business necessity" and "job relatedness" are not applicable to cases involving disparate distribution of "benefits" rather than "employment opportunities." It provided no rationale for this distribution which is not supported either by case law[3] or by the policy consid-

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[3]No other court has adopted the Ninth Circuit's view that an employer need not meet the traditional tests of "business necessity" or "job relatedness" to justify compensation and benefit policies with a disparate impact. On the contrary, courts which have been presented with the issue have applied the same job-relatedness standard used in other disparate impact cases. See *Liberles v. Miller* ___ F.2d ___, 32 E.D.P. ¶33684 (7th Cir. 1983) (compensation policy, which had a disparate impact on blacks, is unlawful as it was not shown to be job-related); *Members v. City of Bridgeport*, 646 F.2d 55, 61 (2nd Cir. 1981), *cert. den.* 454 U.S. 897 (1981) (paying higher salaries to employees passing job-related test is lawful.

erations underlying the disparate impact theory of discrimination.

In *Griggs*, the Supreme Court held that Congress intended to prohibit practices neutral on their face yet discriminatory in operation. 401 U.S. at 431. Nonetheless, the court recognized that Congress had not intended to interfere with an employer's ability to set legitimate employment criteria and hire only persons who can perform the work of the business. 401 U.S. at 434. The "job relatedness" standard accommodates these interests by generally prohibiting practices with a disparate impact, but permitting employers to continue such practices where they have a significant relationship to job performance. Employers are cautioned to "measure the person for the job and not the person in the abstract." 401 U.S. at 436.

These same considerations are just as relevant to compensation and benefit cases. There is no indication in *Griggs* that it would have been any more lawful for the employer to pay black employees less because they lacked high school diplomas or had not passed general intelligence tests than it was to deny them employment for these non-job-related reasons. As in the "employment criteria" cases, an employer must pay an employee according to the work he performs and not based on some abstract criterion which is not job related and which disproportionately disfavors one sex.[4]

[4]This is supported by EEOC guidelines which take the position that benefit plans which have a disparate impact on women must be shown to be job related to be lawful. In fact, the Commission has specifically rejected the use of "head of household" requirements because of their lack of any relevance to job performance. 29 C.F.R.

The Ninth Circuit cited *Bonilla v. Oakland Scavenger Co.* 697 F.2d 1297 (9th Cir. 1982), *pet. for cert. pending* (No. 82-1699), for the proposition that a new and lighter standard applies to "benefit" cases. There is nothing in *Bonilla* which supports this notion. On the contrary, the *Bonilla* court relied on the decision in *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975) and the Ninth Circuit opinion in *Contreras v. City of Los Angeles,* 656 F.2d 1267 (9th Cir. 1981) (both "selection criteria" cases) in formulating the employer's burden. The standard applied by the Court — that the policy be justified by legitimate and overriding business considerations — is based on language frequently used in selection criteria cases to emphasize the magnitude of the employer's burden of proving business necessity. Courts have stressed that it is not sufficient for an employer merely to articulate a business purpose of rational basis for a policy having a disparate impact. *Blake v. City of Los Angeles,* 595 F.2d 1367 at 1376-1377 (9th Cir 1979), *cert. denied,* 446 U.S. 928 (1980); *Contreras v. City of Los Angeles, supra,* 656 F.2d at 1276, *Williams v. Colorado Springs School District,* 641 F.2d 835 (10th Cir. 1981). Rather, to prove business necessity, the employer must demonstrate that it has an overriding and legitimate business purpose which is sufficiently compelling to outweigh the discriminatory impact of the practice. *Harris v. Pan American World*

§1604.9(c). The Commission's guidelines interpreting Title VII are entitled to great deference by the courts. *Griggs v. Duke Power Co.,* 401 U.S. at 434. See also 29 C.F.R. §800.149 (Department of Labor regulation interpreting the Equal Pay Act to prohibit basing pay differentials on "head of household" status).

Airways, 649 F.2d 670 at 675 (9th Cir. 1980); *Blake v. City of Los Angeles, supra; Hawkins v. Anheuser Busch, Inc.*, 697 F.2d 810 at 815 (8th Cir. 1983); *Williams v. Colorado Springs School District, supra*, 641 F.2d at 841; *Robinson v. Lorrilard*, 444 F.2d 791 at 798 (4th cir. 1971). Insofar as the Court of Appeals has construed *Bonilla* to impose a lesser burden, it is in conflict with the standards set by this Court. *Bonilla* in no way departs from the established standard. In fact an accurate reading of *Bonilla* shows that *Bonilla* holds that the employer's desire to provide for the families of its founders, while a legitimate concern, was not sufficiently compelling to override the disparate impact of its policies on minority employees. Similarly, respondent's desire to save money or to provide medical care only to "needy" spouses is not sufficiently compelling to override the exclusionary impact of the head of household rule on its female employees.

CONCLUSION

The opinion of the Ninth Circuit permits an employer to justify a discriminatory practice by proof that it would be extremely costly to stop discriminating. There is no precedent for such a decision, which appears to be clearly contrary to this Court's unequivocal holdings that cost is not a defense to a discriminatory employment practice.

In addition, the opinion tells employers that impact discrimination is more easily justified as a business necessity than intentional discrimination. That holding is without precedent, is contrary to the goal of Title VII to

eliminate all discrimination, both intentional and by impact, and conflicts with this Court's rulings in *Griggs* and its progeny.

Both the cost and the standard of proof questions are important questions of Title VII law which should be decided by this Court. Accordingly, petitioners respectfully request this Court to grant their petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: November 3, 1983.

Respectfully submitted,
BONJOUR, GOUGH & STONE

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KERRY M. GOUGH
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Appendix

APPENDIX A

Filed May 17, 1983

In the United States Court of Appeals for the Ninth Circuit

FRANCES WAMBHEIM, individually and on behalf of all women similarly situated,

Plaintiff-Appellant,

and

CATHERINE HEGGELUND, individually and on behalf of all women similarly situated,

Petitioners,

VS.

J. C. PENNEY COMPANY, INC.,

Respondent.

No. 82-4104
DC #75-2486
WTS
Opinion

Appeal from the United States District Court for the Northern District of California
DISTRICT JUDGE W. T. SWEIGERT, PRESIDING
[Argued and Submitted January 12, 1983]

Before: WRIGHT and CHOY, Circuit Judges, and JAMESON, Senior District Judge.*

PER CURIAM:

Appellants brought a class action contending that two provisions of J. C. Penney's employee medical insurance policy violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and the Equal Pay Act of

*Of the District of Montana.

1963, 29 U.S.C. §206(d).[1] We review their challenge to the head-of-household provision, which permits coverage for an employee's spouse only if the employee earns more than the spouse. Their challenge to the provision denying maternity benefits to unmarried women was not pursued on this appeal.

I. BACKGROUND

Penney offers medical and dental insurance to its employees who work at least 20 hours per week. Penney pays about 75 percent of the cost. There are three contribution rates for employees: (1) for the employee only; (2) for the employee and one dependent, whether spouse or child; and (3) for the employee and two or more dependents.

From 1955 to 1971, only male employees could obtain coverage for their spouses. In 1971, the head-of-household rule was adopted, allowing any employee to obtain coverage for a spouse if the employee earned more than half of the couple's combined income, excluding interest and investment income, disability benefits, social security, and pensions. Penney continued coverage of all wives who were formerly included until this suit was filed.

Seventy percent of Penney's employees are female and most of these women work in low-paying sales positions. Women hold 6.7 percent of the profit-sharing

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[1] Appellants have not disputed Penney's contention that no evidence of an Equal Pay Act violation was introduced. The trial court did not consider the Equal Pay claim in its disposition. Further, appellants' arguments on appeal have mentioned that claim only in passing. It has not been presented properly for review here.

management positions and 35.5 percent of the lower-level management positions. Only 37 percent of the women, but 95 percent of the men covered by the medical plan, receive dependent coverage. Only 12.5 percent of the married female employees qualified as heads of household, while 89.34 percent of the married males qualified.

The district court's first decision granted Penney's motion for summary judgment. It held that the facts did not establish a prima facie case of discrimination.

On appeal of that decision, we reversed. *Wambheim v. J. C. Penney Co.*, 642 F.2d 362 (9th Cir. 1981). We held that proof of the head-of-household policy's disparate impact established a prima facie case of discrimination. *Id.* at 365.

Following trial on remand, the district court entered judgment for Penney. It concluded that Penney had established a business justification for its head-of-household rule and that the rule was not a pretext for discrimination.

II. APPLICABLE LAW

Title VII prohibits two types of employment discrimination. First, it prohibits disparate treatment: intentional unfavorable treatment of employees based on impermissible criteria. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 & n.15 (1977). Second, it prohibits practices with a discriminatory impact: facially neutral practices that have a

discriminatory impact and are not justified by business necessity. *Id.* Appellants contend that the facially neutral head-of-household rule has an impermissible disparate impact on female employees.

This case is an unusual disparate impact case because it alleges a violation of §703(a)(1) of the Act: discrimination with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2(a)(1). The disparate impact theory has been developed in cases alleging violations of §703(a)(2): discrimination with respect to "employment opportunities or . . . status as an employee." 42 U.S.C. §20003-2(a)(2). E.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Connecticut v. Teal*, 102 S. Ct. 2525 (1982). The Supreme Court has not decided explicitly that disparate impact analysis is appropriate in a §703(a)(1) case. *See City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 n.20 (1978).

A recent decision of that Court, however, implies that disparate impact analysis may be applied to a §703(a)(1) claim. *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534 (1982). Without specifically considering the distinction between §703(a) (1) and (a) (2) claims, in *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1302-04 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3775 (U.S. April 15, 1983) (No. 82-1699), this circuit has applied a disparate impact analysis to a §703(a) (1) claim. We conclude that disparate impact analysis is appropriate in this §703(a) (1) case.

To establish a prima facie case under a disparate impact theory, a plaintiff must show that the challenged practice has a significantly discriminatory impact. *Connecticut v. Teal*, 102 S. Ct. at 2531. It is not necessary to establish discriminatory intent. *Griggs*, 401 U.S. at 432; *Bonilla*, 697 F.2d at 1303. This court has decided already that a prima facie case was established by these plaintiffs. *Wambheim*, 642 F.2d at 365.

The burden, therefore, shifted to Penney to justify its policy.[2] *See Albemarle Paper*, 422 U.S. at 425; *Bonilla*, 697 F.2d at 1303. The standard applied in §703(a) (2) cases is business necessity, *see Griggs*, 401 U.S. at 431, manifest relationship to the employment, *see Connecticut v. Teal*, 102 S. Ct. at 2531, or necessity for the efficient operation of the business. *See Peters v. Lieuallen*, 693 F.2d 966, 969 (9th Cir. 1982). Because none of these measures is particularly applicable to the §703(a) (1) employment benefits case, we adopt the standard articulated in *Bonilla:* Penney must "demonstrate that legitimate and overriding business considerations provide justification," *Bonilla*, 697 F.2d at 1303.

Even if Penney established a justification for the head-of-household policy, the plaintiffs could prevail by

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[2]On the first appeal in this case, the court relied heavily on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in its discussion of the shifting burdens in a disparate impact case. *McDonnell Douglas*, however, was a disparate treatment case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

The court's confusion did not taint its decision on the only issue presented there, the existence of a prima facie case of discrimination. Because it relied on *McDonnell Douglas*, its statement of the employer's burden in rebuttal of the prima facie case was erroneous, and we are not bound to apply it here. *See United States v. Fullard-Leo*, 156 F.2d 756, 757 (9th Cir. 1946); *Electrical Research Products v. Gross*, 120 F.2d 301 (9th Cir. 1941); 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶0.404[1] (2d 3d. 1982).

showing that the practice was used as a pretext for discrimination. *Connecticut v. Teal,* 102 S. Ct. at 2531. Evidence that the policy was a pretext might include proof of past intentional discrimination, *see United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558 (1977), or proof that an alternative policy would serve the employer's legitimate interests with less disparate impact. *Albermarle Paper,* 422 U.S. at 425.

III. PENNEY'S MEDICAL PLAN

Because the sufficiency of the appellants' prima facie case has been established already, *Wambheim,* 642 F.2d at 365, we begin our review by considering Penney's justification for its head-of-household rule.

Penney explains that the rule is designed to benefit the largest number of employees and those with the greatest need. It concluded that dependent children and spouses covered under the head-of-household rule have the greatest need for dependent coverage. Qualifying spouses are less likely to have other medical insurance. It seeks to keep the cost of the plan to its employees as low as possible, so that the needy can afford coverage. If all spouses are included, the contribution rates will increase.

We conclude that these are legitimate and overriding business justifications for the head-of-household rule. Penney's justification for making qualification as a head of household dependent on comparative earned income does not conflict with Title VII's requirement of nondiscriminatory employment practices.

Appellants' argument that Penney's defense is an impermissible cost defense is without merit. They rely on the Supreme Court's decision in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), which holds that the cost differential of providing benefits to male and female employees is not a legitimate justification for intentional discrimination between the sexes.

Manhart is not controlling here. Penney has offered legitimate and overriding business justifications for adoption of its head-of-household rule. Cost undoubtedly was a factor considered in the process, as it will be in structuring any employee benefits plan. *Manhart* does not require the conclusion that the neutral policy adopted violates Title VII, when it is justified by independent legitimate business considerations.

That, however, does not end our inquiry. Penney's business justification defense was countered by evidence that the rule is a pretext for impermissible discrimination. Penney historically has discriminated against women in providing benefits. It could have chosen other methods to determine spousal eligibility for coverage.

The district court concluded that the head-of-household rule was not a pretext for sex discrimination. This was a finding of fact, which we shall overturn only if it is clearly erroneous. *See Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1789-91 (1982). We are not convinced that a clear mistake has been made.

The district court correctly concluded that Penney's head-of-household rule does not violate Title VII.

The judgment is affirmed.

APPENDIX B

Filed, August 15, 1983

In the United States Court of Appeals for the Ninth Circuit

FRANCES WAMBHEIM, individually and on behalf of all women similarly situated,

Plaintiff-Appellant,

and

CATHERINE HEGGELUND, individually and on behalf of all women similarly situated,

Plaintiff in Intervention and Appellant,

VS.

J. C. PENNEY COMPANY, INC.,

Defendant-Appellee.

No. 82-4104
DC #75-2486
WTS
Order

Before: WRIGHT and CHOY, Circuit Judges, and JAMESON, Senior District Judge.*

The panel as construed in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The opinion of May 17, 1983 is amended as follows:

At page 2234 of the slip opinion, column 2, after the *Peters v. Lieuallen* citation, the following language will be added:

; *see generally Contreras v. City of Los Angeles*, 656 F.2d 1267, 1278-80 (9th Cir. 1981).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Filed, Feburary 12, 1982

United States District Court
Northern District of California

FRANCES WAMBHEIM, individually and on behalf of all women similarly situated,

Plaintiff,

and

CATHERINE HEGGELUND, individually and on behalf of all women similarly situated,

Plaintiff in Intervention and Appellant,

VS.

J. C. PENNEY COMPANY, INC.,

Defendant.

No. C 75 2486 WTS
Memorandum of Decision

This case is on remand to this court with direction to proceed with the case upon the theory that plaintiff has made a prima facie showing that a so-called "head of household" rule, which is part of Penney's medical/dental health plan for its employees, is discriminatory against its female employees because, although facially neutral as to sex, it has a disparate impact upon female employees in that, under the application of the rule, only 37% of covered female employees choose to enroll

for dependent coverage as compared with 95% of the men. *Wambheim* v. *J. C. Penney Co., Inc.*, 643, F.2d 362 (9th Cir. 1981).

We have, therefore, held a trial upon the issues as so directed.

Briefly, the medical plan allows an employee to enroll dependent children and also a spouse — the latter, however, only if the employee earns more than 50% of the combined earned income of the spouses. In all other respects the rule is neutral so far as sex is concerned.

Plaintiff contends that on the evidence adduced at trial it has made a prima facie showing of sex discrimination, that defendant has not shown any business justification for its rule, that defendant's attempt to do so is a mere pretext, and that plaintiff is therefore entitled to judgment.

More specifically, plaintiff contends that Penney's so-called "business justification" defense is insufficient because (1) it is based primarily upon cost; (2) (to the extent it is not based upon cost) it does not bear upon Penney's job performance; and, further, (3) it is mere pretext.

In the pending case the record shows that Penney provides almost 50 million dollars a year for the medical/dental care of its employees and, although it requires some contributions from the employees, the cost to the employees is substantially less than the cost of the benefits they receive. If Penney is required to provide

medical and dental benefits to the higher earning spouses of its employees, its contribution to such increased costs would amount to from three to five million dollars a year — almost 10% of Penney's present medical/dental plan cost, and would also increase each employee's contribution toward the three to five million dollar increase. If this additional cost were paid entirely from employee contributions, the employees' contributions would have to be increased by over 50%.

However, Penney's business justification defense is not based solely on the additional cost of providing medical and dental benefits to the higher earning spouses of its employees. Its position is that it has allocated a part of its finite resources to health care in a way that will benefit the largest number of its employees and those with the greatest need — including benefits, not only for full-time employees, but also for part-time employees who constitute approximately 70% of Penney's total employees.

In arriving at its policy of using the head of household rule, Penney has concluded that its employees' dependent children and its employees' "low earning" spouses, i.e., low earning because of the spouses' unemployment or lower earning ability, should be the objects of its concern and its bounty; that, conversely, its employees' higher earning spouses are much more likely to already have medical coverage from their own employers or to be able to afford to purchase it if it is not so available; and that cost to its employees should be kept as low as possible so that those who really need and deserve coverage can obtain it.

This business justification of Penney's is not barred by the United States Supreme Court's decision in *City of Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U.S. 702 (1978), holding that the cost of providing benefits to females may not serve as a justification for discriminating against them. *Id.*, at 716-17. We read *Manhart* as prohibiting only a cost defense based on the increased cost of providing benefits to women as opposed to men; i.e., where, as in *Manhart*, the cost differential is based on the sex of the class denied the benefit. *Ibid.* In the instant case, the cost differential is based on the relative earnings of the class denied the benefit without regard to sex. Unless the cost justification is a mere pretext for discrimination against women under general Title VII standards, cost may be a relevant consideration in business decisions to deny benefits to a certain class which are in no way gender based.

The law of this case, as laid down by the Ninth Circuit Court of Appeals, is that, although proof of disparate impact satisfies the burden of going forward, it does not necessarily satisfy the burden of persuasion, and that this court is not compelled to find discrimination on the set of facts required to prove a prima facie case. *Wambheim* v. *J. C. Penney Co., Inc., supra*, 642 F.2d at 365.

In this respect the court, having held a full trial of the issues, finds and concludes that the defendant has not by its "head of household" rule discriminated against its female employees — intentionally or otherwise.

The court further finds and concludes that the prior history of Penney with respect to discrimination against women on grounds of sex, has not been such as to show that its challenged "head of household" rule is in reality a pretext for further discrimination — invidious or otherwise.

The court further finds and concludes that defendant's so-called "maternity benefits" — marital status — rule, combined with other policies of Penney, including its "head of household" rule, has not been shown to produce any disproportionate impact on Penney's female employees, nor have such policies, considered alone or together, constituted sex discrimination against women.

Judgment, therefore, is accordingly rendered in favor of defendant and against plaintiff and the class plaintiff represents.

This memorandum constitutes the findings of fact and conclusions of law of the court within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, as allowed for therein.

Dated: February 11th, 1982.

W. T. SWEIGERT
United States District Judge

APPENDIX D

United States Court of Appeals
Ninth Circuit

FRANCES WAMBHEIM, and CATHERINE HEGGELUND, individually and on behalf of all women similarly situated,
Plaintiffs and Appellants, and Appellant,
VS.
J. C. PENNEY COMPANY, INC.,
Defendant and Appellee.

No. 79-3306

Argued and Submitted Feb. 12, 1981
Decided April 20, 1981

Before: FARRIS and FERGUSON, Circuit Judges, and CRAIG,* District Judge.

FERGUSON, Circuit Judge:

Plaintiffs Frances Wambheim and Catherine Heggelund brought a class action under Fed.R.Civ.P. 23 alleging that two policies of J.C. Penney Co. violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e,[1] and the Equal Pay Act of 1963, 29 U.S.C.

*Honorable Walter E. Craig, Senior United States District Judge, District of Arizona, sitting by designation.

[1] The Civil Rights Act was amended in 1978 to include pregnancy as a factor in the definition of "on the basis of sex." 42 U.S.C. §2000e(k). Because the facts in this section took place before 1978, this case is not controlled by the amendment; accordingly, we do not consider it.

§206(d). Penney's medical insurance plan includes a head-of-household rule which permits the spouse of an employee to receive medical and dental benefits only if the employee earns more than the spouse. Until 1977, Penney also included in its medical plan maternity benefits for its married, but not for unmarried, women. Plaintiffs claim that those provisions constitute illegal sex discrimination.

The district court granted Penney's motion for summary judgment, concluding that the facts did not constitute a prima facie case of discrimination. We reverse and remand.

I. FACTS

A. The Head of Household Rule

From 1955 until 1971, Penney's insurance policy was facially discriminatory, allowing only men to receive coverage for their spouses. In 1971, management changed the provision to the facially neutral head-of-household rule, allowing both sexes to receive dependent coverage if the employee earned more than 50% of the combined income of the spouses. The new rule excludes as income money earned from stocks, bonds, savings accounts, disability benefits, social security or pensions.

At the time of the change, Penney continued coverage as before, regardless of income, for the spouses of employees (all necessarily male) formerly included in the plan. This grandfathering provision was discontinued when the instant action was filed.

Penney's work force consists of 70% women. Sixty percent of these women work in low-paying sales positions, compared to 33% of the men Penney employees. Women occupy 6.7% of the profit-sharing management positions and 35.5% of the lower-level management. As a result, 37% of the women covered by Penney's medical plan receive dependent coverage; the comparable figure for men is 95%.

Wambheim claims that Penney's hiring practices, the history of its medical insurance program,[2] and its refusal to include all earnings in its definition of income indicate that its head-of-household rule is a pretext for the continuation of discrimination against women. Penney claims that the rule is neutral on its face and justified by cost analysis. The Equal Employment Opportunity Commission ("EEOC") in its amicus curiae brief contends that its guidelines and a Department of Labor regulation prohibit head-of-household rules.[3]

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[2]For instance, Penney continued coverage for the wife of one management employee after her income exceeded his. Penney claims that this was accidental.

[3]The Department of Labor regulation states that head-of-household status does not constitute a "factor other than sex" exception to the Equal Pay Act:

> Sometimes differentials in pay to employees performing equal work are said to be based on the fact that one employee is head of the household and the other, of the opposite sex, is not. In general, such allegations have not been substantiated. Experience indicates that where such a factor is claimed, wage differentials tend to be paid to the employees of one sex only, regardless of the fact that employees of the opposite sex may bear equal or greater responsibility as head of a household or for the support of parents or other family dependents. Accordingly, since the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a head of household or head of family status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the administrator is that they are not prepared to conclude that any differential allegedly based on such status is based on a factor other than sex within the intent of the statute. 29 CFR §800.149

The EEOC Guideline states that such a rule is a prima facie violation of Title VII:

The district court granted Penney's motion for summary judgment, finding that Wambheim had failed to prove a prima facie case of discrimination. The court relied on *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 n.20, 98 S.Ct. 1370, 1376, n.20, 55 L.Ed.2d 657 (1978), which states:

> Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.

The district court held that a prima facie case is not established by disproportionate effect alone.

B. The Maternity Benefits Rule

Until 1977, Penney's medical coverage included maternity benefits for married women only. Heggelund claims that this policy constituted "sex-plus" discrimination, i.e., discrimination based on sex plus another facially neutral factor — marriage — and that Penney's discriminatory history is evidence of an invidious intent. Furthermore, Heggelund asserts that this policy had a disproportionate impact on women because of the substantial disparity in the numbers of men and women receiving dependent coverage.

> Where an employer conditions benefits available to employees and to their spouses on whether the employee is the "head-of-household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relation to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitons against sex discrimination found in the act.
>
> 29 CFR 1604.9(c)

The district court held that Heggelund failed to prove a prima facie case because she did not demonstrate disproportionate impact. The court grounded its result on a finding that unmarried men and women are both denied benefits under the plan.

II. ANALYSIS

A. The Head-of-Household Rule

The district court held that Wambheim failed to prove a prima facie case of discrimination. We disagree, and accordingly reverse the summary judgment entered in favor of defendants.

[1] A prima facie case is established in a Title VII Case if the challenged employment policy is based on gender. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Proof of a neutral policy's substantially disparate impact also establishes a prima facie case.[4] *Id.* at 431, 91 S.Ct. at 853. The Supreme Court has established a three-step test regarding proof of discrimination when parties assert disparate impact. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[2, 3] First, the plaintiff must demonstrate a facially discriminatory policy or a facially neutral policy which has a substantially disproportionate impact. 411 U.S. at 802 n.14, 93 S.Ct. at 1824 n.14. *See Griggs v. Duke Power Co., supra* 401 U.S. at 431, 91 S.Ct. at 853. This

[4]Though the Court requires proof of intent to maintain a discrimination challenge founded upon the constitution, *Washington v. Davis*, 426 U.S. 229, 247-8, 96 S.Ct. 2040, 2051-52, 48 L.Ed.2d 597 (1976), the standard of a prima facie case under Title VII remains that created in *Griggs*. *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1976).

showing constitutes the prima facie case. Second, the employer may defend on the ground of a valid business justification. 411 U.S. at 802, 93 S.Ct. at 1824. If the defendant offers no proof to justify the practice or policy, the court is entitled to "assume no justification exists," *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143, 98 S.Ct. 347, 352, 54 L.Ed.2d 356 (1977), and find discrimination. On the other hand, the court is not compelled to find discrimination on the set of facts required to prove a prima facie case. *Manhart, supra*, 435 U.S. at 711, n.29, 98 S.Ct. at 1376, n.20; *Satty, supra*, 434 U.S. at 145, 98 S.Ct. at 353. Proof of disparate impact accordingly satisfies the burden of going forward, but may or may not satisfy the burden of persuasion. Finally, the plaintiff may counter that defense with evidence of a prior history of discriminatory intent. Such a history may demonstrate that the challenged policy is in reality a pretext for further ividious discrimination. 411 U.S. at 804, 93 S.Ct. at 1825.

[4] The district court, relying on footnote 20 in *Manhart*, held that a prima facie case could not be established by disparate impact alone. Accordingly, it granted defendant's motion for summary judgment. The court thus misapplied the Title VII analysis described above. Disparate impact, while not proving a case of discrimination, does constitute a prima facie case. The figures introduced by Wambheim show that only 37% of the women covered by Penney's medical plan receive dependent coverage, as opposed to 95% of the men. Because of this disproportionate impact, a prima facie case

exists.[5] The decision to grant summary judgment must therefore be reversed.[6]

B. The Maternity Benefits Rule

[5] The district court found that the provision of maternity benefits only for married women did not produce a disproportionate impact on women, because single men would also be denied these benefits for dependents. Heggelund correctly asserts that the court looked only to the language of the rule and not to its operation under Penney's employment practices.

The maternity provision and the head-of-household provision exist concurrently. Therefore, the maternity provision must be evaluated in the context of a plan which includes the head-of-household rule. Ninety-five percent of the men enrolled in the plan receive dependent coverage, compared with 37% of the women. Conceivably, 63% of the women could be denied coverage for maternity benefits because unmarried, while only 5% of the men are denied benefits for their pregnant

[5] Penney asserts that the plan is facially neutral and in fact an improvement over the prior policy which on its face treated women differently than men. It asserts a cost justification as its valid business reason. Wambheim counters that Penney's policy is in reality a pretext for invidious discrimination. She asserts as evidence Penney's prior policy which facially discriminated against women. She also presents facts demonstrating differing hiring and promotional policies towards men and women. The district court did not consider the validity of Penney's defense or Wambheim's assertion of pretext.

[6] We reverse the district court on the head-of-household issue because disproportionate impact may be demonstrated if 63% of women are married and cannot obtain dependent coverage under the rule. In Part B we reverse on the maternity benefits issue because if that 63% without dependent coverage are single, the disproportionate impact falls too heavily on women under that rule. The record does not indicate whether either of these contradictory assumptions is correct. The district court may not grant summary judgment without a determination of the disputed issue of impact which relies on an explanation of these facts.

dependents.[7] The rule, while facially a marital-status rule, may have been an invidious perpetration of an overall policy to discriminate against women, as Heggelund asserts.

While the inclusion in the plan of the no maternity benefits rule is allowed, *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), and the marital status rule may be upheld,[8] the combination of these two rules with a head-of-household rule, which allegedly has a disparate impact on women, may disproportionately affect women covered by the plan. Accordingly, as the district court did not consider the impact in light of the operation of Penney's hiring policies and the head-of-household rule, the challenge to the maternity benefits rule is remanded to the district court to determine whether that rule, combined with the various policies of Penney, produced a disproportionate impact on women not evidenced by the words of the rule alone.[9]

REVERSED and REMANDED.

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[7] See footnote 5, *id.*

[8] Reliance on cases upholding policies based on marriage, *Grayson v. The Wickes Corp.*, 607 F.2d 1194, 20 FEP Cas. 1289 (7th Cir. 1979), *Stroud v. Delta Airlines, Inc.*, 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844, 98 S.Ct. 146, 54 L.Ed.2d 110 (1977), are, therefore, not directly controlling in this case. In all such cases, the parties did not show that women had been affected disproportionately.

[9] The district court's decision should be distinguished from that in *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), which held that a policy which excluded maternity benefits did not constitute a prima facie case under Title VII. *Gilbert* is based on the fact that the plan produced no disparate impact on women.

APPENDIX E

Filed: May 4, 1979

United States District Court
Northern District of California

FRANCES WAMBHEIM, individually and on behalf of all women similarly situated, *Plaintiff,* VS. J. C. PENNEY COMPANY, INC., *Defendant.*	No. C 75 2486 WTS

Memorandum and Order Granting Defendant's Motion for Summary Judgment and Order Setting Further Proceedings

This is a class action involving alleged sex discrimination in employment brought under Title VII of the Civil Rights Act of 1964 (42 USC §2000e et seq.), 42 USC §1981, and the Equal Pay Act of 1963 (29 USC §216(b)), by plaintiff, Frances Wambheim, an employee of defendant, and plaintiff-in-intervention Catherine Heggelund, a former employee of defendant, against defendant, a Delaware corporation doing a retail store business throughout the United States.

This Court has previously certified a class as follows:

(a) All female full-time[1] employees employed in any

[1] Employees who work more than 35 hours per week.

of defendant's stores in Districts 8566 and 8567 in certain job titles who have been, are being, or may in the future be discriminated against on the basis of sex with respect to their opportunity for promotion to certain specified management positions.

(b) All female married employees in Districts 8566 and 8567 who have been, are being, or may in the future be discriminated against on the basis of sex with respect to the denial of medical and dental benefits coverage for their husbands.

(c) All unmarried female employees in Districts 8566 and 8567 who have been, are being, or may in the future be discriminated against on the basis of sex with respect to the denial of maternity medical benefits.

The action is now before the Court on the cross-motions of the parties for summary judgment on the two medical and dental benefits issues only.

MATERNITY BENEFITS ISSUE

It is undisputed that prior to July 1, 1977, defendant's medical benefits plan limited maternity benefits to married employees and dependent wives of married employees. It is also undisputed that since July 1, 1977, defendant's medical benefits plan, in regard to maternity benefits, applies to all employees, whether married or unmarried, and to the dependent wives of male employees.

Plaintiff-in-intervention Heggelund, an unmarried former employee of defendant, was denied maternity

benefits, while still an employee of defendant, solely on the basis of her being unmarried. She has been permitted to intervene on behalf of the class of all unmarried female employees of defendant in Districts 8566 and 8567 who have been denied maternity benefits solely because they were unmarried. She alleges that the provision violated Title VII of the Civil Rights Act of 1964 (42 USC §2000e at seq.) and the Equal Pay Act of 1963 (29 USC §201 et seq.)

Defendant contends that the maternity benefits provision did not discriminate on the basis of sex but only on the basis of marital status, a discrimination not prohibited by Title VII, citing *Stroud* v. *Delta Airlines, Inc.*, 544 F.2d 892 (5th Cir. 1977) and *Willett* v. *Emory and Henry College*, 427 F.Supp. 631 (W.D. Va. 1977).

However, even though the maternity benefits provision does not, on its face, discriminate on the basis of sex, that does not (as defendant would have it) end the inquiry. The Supreme Court has repeatedly held that a prima facie violation of Title VII may be established by policies or practices that are neutral on their face and intent, but nonetheless discriminate between sexes by having a "disparate impact" on one sex group in the application of the policies or practices. *Teamsters* v. *United States*, 431 U.S. 324 (1977) and cases cited therein; *Dothard* v. *Rawlinson*, 433 U.S. 324 (1977).

So, if defendant's maternity benefits provision discriminated in effect against one sex, e.g., against unmarried female employee by having a disparate impact,

then there could be a violation of Title VII. We turn now to that issue.

It is true that any married female employee, as the active member of the medical plan, and any male employee's dependent wife (i.e., dependent in the sense that she is not the head of household providing 50% or more of the combined income of the employee and spouse) are eligible for maternity benefits. On the other hand, unmarried employees were not entitled to maternity benefits either for themselves or any dependent.

It appears, however, that any discrimination is on the basis of *marital status* rather than sex. Further, the discrimination on the basis of marital status applied to all employees — men as well as women employees.

While it is true that plaintiff-in-intervention, as an unmarried employee, is ineligible for the maternity benefits to which she would have beenentitled if she were married, this is balanced by the fact that an unmarried male employee would be ineligible for maternity benefits to his dependent — dependent benefits to which he would have been entitled if he were married. The only remaining difference in entitlement between married women employees and married men employees stems from the fact that women can give birth and men cannot.

Out holding herein is consistent with the Supreme Court's decision in *General Electric* v. *Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the U. S. Supreme Court held that a company disability plan excluding disability aris-

ing from pregnancy did not violate Title VII. The Court found no sex discrimination on the face of the plan nor any proof of sex discrimination in the effect of the plan. 429 U.S. at 136-40. The concurrences of Justices Stewart and Blackmun (which, since their votes were necessary for the majority opinion, should be considered as the holding of the court, see, *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)), held (1) that the exclusion of disability benefits for disability arising from pregnancy is not *per se* violative of Title VII (by being facially invalid), and (2) that the plaintiffs had failed to prove disparate impact or discriminatory effect in the plan's application to females. See also, *Teamsters* v. *United States, supra; Dothard* v. *Rawlinson, supra.*

Plaintiff-in-intervention here has made no showing of any such impact of the plan upon women any more than upon men employees — other than the impact stemming from their basic physical differences. Any difference of impact upon one or the other, if it may be said to exist at all, is not disparate.

For the foregoing reasons, plaintiff's motion for summary judgment on the maternity benefits issue is hereby denied, and defendant's motion for summary judgment on that same issue is hereby granted.

II. HEAD OF HOUSEHOLD ISSUE

We now turn to the second issue raised by defendant's medical plan. As already noted, defendant's medical plan permits coverage of the spouse of an employee only if the employee, himself or herself, is the "head of

household," i.e., earning more than 50% of the total combined income of the employee and spouse.

Plaintiff herein, a married female employee of the defendant, contends in support of her motion for summary judgment that this head of household requirement, as applied to female employees who want to have their spouse covered as a dependent, constitutes intentional discrimination against women by defendant because the requirement is a mere pretext to perpetuate past discrimination. Alternatively, the plaintiff contends that the plan constitutes discrimination because of its disparate impact on married female employees of the defendant. We will take up this latter question first.

(a) Disparate Impact Theory

As to plaintiff's disparate impact claim, plaintiff contends that the requirement has a disparately discriminatory impact on married female employees of the defendant who desire to have their husbands covered under the medical and dental plans as dependents, as compared with married male employees desiring to have their wives covered.

Defendant points out that the plan is applicable equally to men and women; that it is totally neutral and not conditioned in any way on sex; that the only test as to eligibility for benefits is income and not sex, and that the decision to insure only spouses is a conscious business decision to provide dependent benefits only where the spouse is actually dependent on the Penney employee, male or female. In short, the plan is totally neutral and is equally applicable to males and females.

While it may be true, as plaintiff contends, that the class of female employees may receive disproportionately less benefits due to the fact that male spouses earn more than female spouses, it does not follow that that situation would constitute illegal discrimination on the basis of sex.

In *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), where the Supreme Court held that Title VII was violated by a group insurance plan which required female employees to make higher pension fund contributions than male employees, the Court also addressed the applicability of Title VII and the Equal Pay Act to "gender neutral: plans, such as the one here, which might have disparate impact, saying:

> "A variation on the Department's fairness theme is the suggestion that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees. This suggestion has no force in the sex discrimination context because each retiree's total pension benefits is ultimately determined by his actual life span; any differential in benefits paid to men and women in the aggregate is thus 'based on [a] factor other than sex,' and consequently immune from challenge under the Equal Pay Act, 29 U.S.C. §206(d); cf. n. 24, infra. Even under Title VII itself — assuming disparate impact analysis applies to fringe benefits — the male employees would not prevail. Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not

> imply, and this Court has never held, that discrimination must always be inferred from such consequences." (Citations omitted.)

In our pending case, since each employee's entitlement to benefits is determined, not by sex, but by the employee's income relative to his or her spouse, any difference in benefits ultimately paid is based on a "factor other than sex" and therefore not violative of the law.

So, in the pending case, the ultimate question to be answered here is whether "the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Manhart*, supra at 711.

In our case, individual eligibility is determined on a case-by-case basis through an objective test of comparing the individual's income with that of the income of the spouse. Income is a gender neutral "factor other than sex" and if, therefore, not violative of Title VII or the Equal Pay Act. *City of Los Angeles* v. *Manhart, supra; Gilbert* v. *General Electric, supra; Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977).

(b) "Pretext" Claim

Since the Court finds that the J. C. Penney plan does not violate Title VII or the Equal Pay Act, and that plaintiff has failed to meet her burden of establishing a prima facie case, *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), we need not reach the question of whether the reasons for the health benefits

requirements are mere "pretext."[2] See, *Harper* v. *TWA*, 525 F.2d 409, 411 (8th Cir. 1975).

Wherefore, for the foregoing reasons, the court grants summary judgment on this issue in favor of the defendant.

III. ORDER SETTING FURTHER PROCEEDINGS

Since it appears that the remaining issue with respect to promotion cannot be decided by summary judgment, and no motions having been filed, the Court hereby orders that:

1. Not later than May 11, 1979, the parties shall discuss (either in person or by telephone) the subjects contained in Local Rule 235-6.

2. Not later than May 18, 1979, the parties shall file a joint or separate status report and pretrial statement in accordance with Local Rule 235-7.

3. The Court will hold a pretrial conference in accordance with Local Rule 235-8 on May 25, 1979 at 3:30 P.M., in Judge Sweigert's Chambers and will set a prompt trial date on that time.

Dated: May 2nd, 1979.

W. T. SWEIGERT
United States District Judge

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[2]Regardless, the court finds no evidence of any intentional discrimination based upon the record in this case.

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ALEXANDER L. STEVAS,
CLERK

No. 83-778

IN THE

Supreme Court of the United States

October Term, 1983

FRANCES WAMBHEIM and CATHERINE HEGGELUND, individually and on behalf of all women similarly situated,

Petitioners,

vs.

J. C. PENNEY COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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Statement Required by Rule 28.1

This Brief is filed on behalf of J. C. Penney Company, Inc., which has no parent companies. All of its subsidiaries and affiliates are wholly-owned subsidiaries, except for the following companies: Sarma S.A.; J.C. Penney, G.mbH.

Question Presented.

This is a sex discrimination action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*). Petitioner Frances Wambheim challenged the "relative earnings" rule of Respondent J. C. Penney Company, Inc. ("Penney") which allows an employee to enroll a spouse in the medical/dental plan if the employee earns more than the spouse. The Court of Appeals for the Ninth Circuit found no violation of Title VII. The Court found that Penney had legitimate and overriding business justifications for this rule and that the rule was not a pretext for sex discrimination.

The real issue raised by the Petition for Certiorari is whether the Court of Appeals was correct in finding legitimate and overriding business justifications for the rule. Petitioners attempt to confuse this real issue by arguing that the Court of Appeals permitted an incorrect justification of the rule and failed to follow precedent in applying the "standard of proof". Petitioners are wrong.

There is no basis for granting the Petition. The decision of the Court of Appeals is not in conflict with a decision of this Court or a decision of any other Court of Appeals and no important federal question is involved.

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No. 83-778

IN THE

Supreme Court of the United States

October Term, 1983

FRANCES WAMBHEIM and CATHERINE HEGGELUND, individually and on behalf of all women similarly situated,

Petitioners,

vs.

J. C. PENNEY COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioners contend that Penney violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) by its practice of conditioning medical and dental benefits for an employee's spouse upon the relative earnings of the employee and the spouse. The District Court and the Court of Appeals for the Ninth Circuit found no violation.[1] *Wambheim v. J.C. Penney Co., Inc.*, 705 F.2d 1492 (9th Cir. 1983) (Appendix A to Petition).

[1]Petitioner Heggelund intervened in the action only to challenge the provision denying maternity benefits to unmarried women. This challenge was not pursued on appeal to the Ninth Circuit. Additionally, the Ninth Circuit found that Petitioners did not present for review on appeal the alleged Equal Pay Act violation. Thus, these claims have been waived. Moreover, since Ms. Heggelund's claim was not appealed to the Ninth Circuit, she has no standing to petition for a writ of certiorari in this case.

A. Penney Offers a Comprehensive Benefit Package to Its Employees.

Penney offers to its eligible employees nationwide a comprehensive plan of benefits including medical and dental coverage, a pension plan, a savings and profit sharing plan, discount privileges, life insurance and a disability plan. (RT 286). All of these Penney benefit plans are offered to eligible employees without regard to their sex. (RT 289). The medical and dental plans are offered to all employees who work 20 hours or more per week. (RT 290-291). Thus, many of the part-time employees, who comprise 70% of the employees, are eligible for medical and dental coverage. In 1976, approximately 128,000 of the 184,000 total employees were eligible to be covered by the benefits package offered by Penney. (RT 291).

Employees choose to enroll in the medical and dental plans and they pay part of the cost of the plan. In 1976, approximately 78% of the eligible employees elected to participate in the medical plan. (RT 292). Approximately 55% of the eligible employees elected to participate in the dental plan. (RT 295). The contribution rates for the employees approximate 25% of the total cost of the medical and dental plans. Penney pays the remaining 75%. (RT 311). These contribution rates are the same for male and female employees. (Ex. E, ER 190). In 1981, the total cost of the medical plan was approximately $64 million to Penney and $21 million to the employees. (Ex. 35, ER 92).

B. The Risks Covered by the Penney Medical/Dental Insurance Plan Are Equivalent for Male and Female Employees.

The Penney medical/dental plan does not distinguish between male and female employees for the risks which it covers. For example, even prior to the Pregnancy Discrim-

ination Act of 1978, all employees have been covered under the same terms for pregnancy. (Ex. D, ER 151, 155). The relative earnings rule does not change this basic equivalency.

C. The Relative Earnings Rule Is a Legitimate Business Decision to Allocate Penney's Finite Resources in a Fair, Reasonable and Workable Manner.

Penney does not in any way condition participation in the medical and dental plans on the basis of sex. The plans are truly sex-neutral. Penney has maintained a "relative earnings" rule for spousal medical and dental coverage for the following business reasons:

(1) The intent of Penney is to allocate the finite resources available to health care in a way that will benefit the largest number of employees. Thus, benefits are available for part-time employees, 70% of whom are female employees. (RT 295, 299).

(2) Penney has decided that an employee's dependent children and an employee's unemployed or lower-earning spouse have the greatest need for dependent benefits. (RT 302-303).

(3) While employees contribute to the medical and dental plan coverage in part, Penney desires to keep the cost as low as possible so that those who need and deserve coverage can obtain it. (RT 311). Eliminating the rule might increase the employee's contribution, thereby reducing the participation of employees in the medical and dental plan.

(4) Penney does not feel a need to provide medical and dental coverage to the employees of other employers or to higher-earning spouses, who are more likely to have

insurance coverage or be able to afford it.[2] (RT 303).

(5) Penney's relative earnings rule does not measure immutable characteristics but rather looks at the individuals and their spouses and judges them in light of conditions they themselves can change. (RT 296, 310).

The spouses of both male and female Penney employees are eligible for inclusion in the medical/dental plan, based on the relative earnings of the employees and their spouses. The categories of eligible and ineligible spouses include both males and females.

As the District Court found and as the Court of Appeals agreed, Penney had no intent to discriminate against female employees by the adoption of the relative earnings rule. (RT 310). Penney provides all its employees the equal *opportunity* to obtain spousal coverage. If a female employee fails to qualify as head of household, the reasons for not qualifying relate to the employee's and her spouse's relative incomes and personal decisions such as whether the female employee will work full-time or part-time. For example, more females work in part-time jobs than do males and more wives stay at home and do not work than do husbands. (RT 106, 111). Penney has no control over these individual decisions.

D. The Principle of Insurance Assumes That There Will Be Disparate Effects.

Petitioners complain that the Penney medical plan provides different benefits to males than to females. Group medical insurance by its very nature has various disparities

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[2]Mr. and Mrs. Wambheim earn approximately $60,000 per year. Mr. Wambheim's employers have always provided medical insurance for Mr. Wambheim, Mrs. Wambheim and their children. Petitioner has not lost any money by reason of the relative earnings rule and in fact saved money by not paying the extra premium for including a spouse. (RT 55, 62, 76-77, 232; ER 56, Ex. H).

built into it. In the group insurance plan, an average rate is charged for the entire group even though various sub-groups receive greater benefits. For example, older employees receive a larger benefit than younger employees, yet the rate charged for each group is the same. (RT 206). Of course, individual employees within the sub-groups might receive dramatically different benefits even though another group actuarily would receive more. (RT 208). The use of an actuarial analysis to assess whether a disparate impact is occurring in an insurance plan is difficult since it lumps all people together for analysis even though it is clear that individual employees will have different benefits received from the plan. (RT 208).

The actuarial costs for male and female employees are different. Even so, Penney charges the same rates to male and female employees. (RT 209). For example, single males receive less actuarial benefits than single females but are charged the same contribution rate. (RT 162, 229).

Petitioners attempted to determine the actuarial benefit (not the actual benefit) received by male and female employees under the Penney medical plan. Petitioners compared the actuarial benefit for male and female employees in ten categories. In one of the ten categories, the female employee receives a lower benefit than a male employee insuring the same group of dependents. *In the remaining nine categories, the female employee receives the greater benefit compared to the male employee.* (RT 163).

Petitioners also argued that the medical benefits paid to male employees was greater than that paid to female employees.[3] Petitioners *estimated* that the total cost to Penney

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[3]In order to ensure that there was no "disparate impact" in the actuarial benefits between males and females, an employer would have to charge different employee contribution rates to males as opposed to females or control the hiring and firing of males and females according to certain risk factors which include the sex of the employee. (RT 224). Such alternatives, of course, are illegal.

for medical benefits for female employees and their dependents in one small geographical location was approximately $496,000.00 to $546,000.00. The corresponding estimate for male employees and their dependents was approximately $179,000.00 to $272,000.00. Depending upon certain assumptions, Petitioners estimated that the average cost to Penney for female employees ranged from $432.00 to $476.00. The corresponding average cost for male employees ranged from $358.00 to $544.00.

Thus, using Petitioners' own analysis, the medical plan benefits do not favor either the class of male employees or female employees who choose to enroll in the plan. Rather, the results vary depending upon certain assumptions made by the actuary.

E. The Court of Appeals Found Legitimate and Overriding Business Justifications for the Rule.

The Court of Appeals reviewed the justification of Penney for its relative earnings rule. It specifically found that the following are legitimate and overriding business justifications for the rule:

> "Penney explains that the rule is designed to benefit the largest number of employees and those with the greatest need. It concluded that dependent children and spouses covered under the head-of-household rule have the greatest need for dependent coverage. Qualifying spouses are less likely to have other medical insurance. It seeks to keep the cost of the plan to its employees as low as possible, so that the needy can afford coverage. If all spouses are included, the contribution rates will increase." *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495. (Appendix A to Petition).

The Court of Appeals also found that the rule was not a pretext for sex discrimination. *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495-6. (Appendix A to Petition).

REASONS FOR DENYING THE WRIT.

The petition for a writ of certiorari should be denied for the following reasons:

(1) The decision of the Court of Appeals for the Ninth Circuit does not conflict with a decision of this Court or a decision of any other Court of Appeals. The Ninth Circuit followed legal precedent in deciding that Penney did not violate Title VII. The defense of Penney is not a cost justification defense but is a legitimate and overriding business justification defense. The Ninth Circuit also applied a standard of proof consistent with this Court's cases in this area.

(2) Petitioner is attempting to overturn the findings of fact that Penney has legitimate and overriding business justifications for its rule. No important federal question is involved in reviewing such findings.

(3) This case has no significance beyond the parties. Penney is the only major employer to provide spousal coverage in this manner.

A. The Ninth Circuit Decision Does Not Conflict With Other Decisions.

1. The Ninth Circuit Did Not Adopt a Cost Defense but Followed Precedent.

Petitioners argue that the Ninth Circuit permitted Penney to justify its rule by a cost justification defense. Petitioners are wrong. The Ninth Circuit found that Penney justified its rule with the following legitimate and overriding business considerations:

(1) The rule is designed to benefit the largest number of employees and those with the greatest need.

(2) Dependent children and spouses covered under the relative earnings rule have the greatest need for dependent coverage.

(3) Spouses qualifying under the relative earnings rule are less likely to have other medical insurance.

(4) Penney seeks to keep the cost of the plan to its employees as low as possible so that the needy can afford coverage. If all spouses are included, the employee contribution rates will increase.

The only "cost" identified by the Ninth Circuit in its list of business considerations is the cost to the employee.

The Ninth Circuit specifically rejected the argument now advanced by Petitioners as the reason for granting the writ. The Ninth Circuit stated:

> "Appellants' argument that Penney's defense is an impermissible cost defense is without merit. They rely on the Supreme Court's decision in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed. 2d 657 (1978), which holds that the cost differential of providing benefits to male and female employees is not a legitimate justification for intentional discrimination between the sexes.
>
> *Manhart* is not controlling here. Penney has offered legitimate and overriding business justifications for adoption of its head-of-household rule. Cost undoubtedly was a factor considered in the process, as it will be in structuring any employee benefits plan. *Manhart* does not require the conclusion that the neutral policy adopted violates Title VII, when it is justified by independent legitimate business considerations." *Wambheim v. J. C. Penney Co., Inc.*, 705 F.2d 1492, 1495. (Appendix A to Petition).

The Ninth Circuit, therefore, found that the Penney rule was justified by legitimate and overriding business considerations, independent of cost.

The decision of the Ninth Circuit is consistent with this Court's opinions in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris*, ___ U.S. ___, 77 L.Ed. 2d 1236 (1983); and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, ___ U.S. ___, 77 L.Ed. 2d 89 (1983).

In *Manhart* and in *Norris*, the employers classified the employees on the basis of sex and sex alone. All women in *Manhart* paid more than men; all women in *Norris* received less benefits than men. The Court instructed that ". . . Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual or national class' ". *Norris*, 77 L.Ed. 2d 1236, 1248. It is Petitioners' argument — that Penney's individualized objective test for need is discrimination against women — that embodies precisely such a prohibited stereotype of women.

Similarly, in *Newport News*, the employer had created an intentional gender-based distinction between male and female employees. The Court reiterated that the proper test of discrimination is whether the rule shows treatment of a person "in a manner which *but for* that person's sex would be different". 77 L.Ed. 2d at 102.

In these three cases the employer did not have a legitimate justification for its rule or practice. Penney does. While the Supreme Court rejected the argument of the employers in these three cases that the gender-based discrimination can be justified by cost, this aspect of these cases is irrelevant to the instant action. The Ninth Circuit did not permit a justification on the basis of cost.

Moreover, Penney's rule does not measure immutable characteristics nor does it involve any gender-based classification of employees. The spouses of both male and fe-

male Penney employees are eligible for inclusion in the medical/dental plan. Conversely, both male and female spouses are subject to exclusion from the plan. Gender is thus irrelevant to inclusion or exclusion.[4] The determining factors regarding whether individual male and female spouses are eligible relate to the individualized decisions of Penney employees and their spouses and not to the employment practices of Penney. Whether an employee, male or female, works part-time, full-time or no time is a function of decisions of the family unit, not Penney. Such career and social decisions determine whether the opportunity for coverage — available to all — will be accepted or rejected. Thus, female employees with dependents are *not* treated "in a manner which but for that person's sex would be different". *Newport News*, 77 L.Ed. 2d at 102. Each employee is treated as an individual. *Manhart, supra*; *Norris, supra*.

2. The Ninth Circuit Applied a Standard of Proof Consistent With Precedent.

Petitioners claim that the Ninth Circuit did not follow precedent in the burden placed on Penney to justify its relative earnings rule. Petitioners are incorrect.[5]

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[4]This Court has never condemned a dependency test that actually measures the individual, such as Penney's relative earnings rule. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Frontiero v. Richardson*, 411 U.S. 677 (1973). Impliedly, the Court would approve a true dependency test, such as Penney's relative earnings rule, that measures the individual.

[5]Petitioners also cite EEOC Guideline 29 C.F.R. 1604.9(c). This guideline is not relevant to the issues in the Petition. The guideline merely provides that a "head of household" test is some evidence of a prima facie case of discrimination. The guideline does not, and could not, foreclose an employer from justifying its rule. The courts below considered Penney's defense and therefore the guideline, which relates only to a prima facie case, is now irrelevant. *United States Postal Services Bd. of Govs. v. Aikens*, ___ U.S. ___, 75 L.Ed. 2d 403 (1983). Moreover, the guideline is concerned with a test that classifies employees on the basis of sex, which Penney's relative earnings test does not.

The Ninth Circuit stated that the burden shifted to Penney "to justify its policy". The standard used by the court was that Penney must "demonstrate that legitimate and overriding business considerations provide justification". The court used this articulation of the standard because it simply makes more sense in analyzing an insurance benefits case. Any insurance plan will have some disproportionate "impact" on males or on females; yet, all insurance plans are not discriminatory. *Manhart*, 435 U.S. 702, 710, n. 20.

The standard articulated by the Ninth Circuit is consistent with the standard adopted in prior cases. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425-435 (1975); *Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The standard was articulated to apply to the facts of this case. A literal application of the "standard" suggested by Petitioners would produce absurd results. It would strike down virtually every insurance plan where actuarial benefits may be greater for females or males. Such plans are not "necessary" to the operation of a business and thus would be invalid under Petitioners' literal application of the standard. Neither Congress nor this Court would ever countenance such a result.

In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Court found that a rule that excluded applicants from employment was "job-related" and bore a "manifest relationship to the employment in question" by the employer's proof that legitimate goals "are significantly served by — even if they do not require — [the employer's] rule". 440 U.S. 568, at 587, n. 31. Similarly, Penney has legitimate and overriding business reasons to justify its rule.

Petitioners even acknowledge that the standard used by the Ninth Circuit was consistent with precedent. Petitioners state:

> "The standard applied by the Court — that the policy be justified by legitimate and overriding business considerations — is based on language frequently used in selection criteria cases to emphasize the magnitude of the employer's burden of proving business necessity . . . [T]o prove business necessity, the employer must demonstrate that it has an overriding and legitimate business purpose which is sufficiently compelling to outweigh the discriminatory impact of the practice." [Petition, p. 18].

Thus, Petitioners concede the standard followed by the Ninth Circuit is consistent with precedent. No conflict exists with other decisions. Petitioners' supposed conflict on the standard of proof is at most an exercise in semantics. The semantical differences in the formulation of Respondent's burden cannot obscure the fact that the courts below weighed Petitioners' evidence and found it wanting. Accordingly, Petitioners' quarrel is not with the standard but with the findings reached by the Ninth Circuit.

B. Petitioners Are Seeking to Overturn Findings of Fact.

As noted, Petitioners' true contention is not that the improper standard was applied, but that an incorrect result was reached by the Ninth Circuit. Petitioners are upset with the findings of both the District Court and the Ninth Circuit that Penney had legitimate and overriding business justifications for its rule.

A petition for writ of certiorari should not be granted to review such findings. No important federal question of law will be decided by such a review.

CONCLUSION.

Respondent requests that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit for the reasons set forth in this Brief.
Dated: December 15, 1983.

Respectfully submitted,

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No. 83-778

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCES WAMBHEIM AND
CATHERINE HEGGELUND, ETC., PETITIONERS

v.

J.C. PENNEY COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondent, which provides health insurance benefits to its employees, may permit only an employee who is a "head of household" — that is, who earns more than his spouse — to obtain health insurance for his spouse, when that practice has an adverse disparate impact on respondent's female employees.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent operates a chain of retail stores. Approximately 70% of respondent's employees are women, but the higher managerial ranks are predominately male: women hold less than 7% of the profit-sharing management positions and 35.5% of the lower-level management positions. Two-thirds of respondent's male employees hold management positions. Pet. App. 3D.

Respondent has made medical and dental insurance available to all its employees since 1955. From 1955 until 1971, however, respondent allowed only male employees to

obtain health insurance coverage for their spouses. In 1971, respondent replaced this explicit distinction with the "head-of-household" rule that is now in issue. This rule provides that only the head of a household — defined as a person who earns more than half of a married couple's earned income — can obtain health insurance coverage for his or her spouse.[1] As a result of the head-of-household rule, 89.3% of respondent's married male employees, but only 12.5% of its married female employees, can obtain health insurance for their spouses. Pet. App. 2A-3A.

2. Petitioners brought this class action on behalf of the married women employed by respondent at its 34 stores in northern California. Petitioners claimed, among other things, that the head-of-household rule constituted employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* They sought declaratory and injunctive relief and damages.

The United States District Court for the Northern District of California granted summary judgment for respondent (Pet. App. 1E-9E), but the court of appeals reversed (*id.* at 1D-8D; 642 F.2d 362). The court of appeals held that petitioners had established a prima facie case by showing that the head-of-household rule had a disproportionate adverse impact on women (Pet. App. 6D-7D). The court of appeals remanded to permit the district court to consider respondent's defenses and petitioner's additional claim that the rule was adopted for deliberately discriminatory purposes.

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[1] Respondent simultaneously adopted a "grandfather" clause allowing any male employee who had previously insured his wife to continue to do so, whether or not he satisfied the head-of-household criterion. Respondent abandoned this practice when this suit was brought. Pet. App. 2A.

On remand, the district court held a trial and again entered judgment for respondent (Pet. App. 1C-5C). The district court ruled that respondent had overcome petitioners' prima facie case of disparate impact by showing, in two ways, a "business justification" for the head-of-household rule. First, the court stated, eliminating the head-of-household rule would significantly increase the cost of respondent's health insurance plan.[2] Second, the district court suggested, the head-of-household rule operates to "benefit the largest number of [respondent's] employees and those with the greatest need" (*id.* at 3C). The district court explained that respondent "has concluded that its employees' * * * 'low earning' spouses * * * should be the objects of its concern and its bounty; that, conversely, its employees' higher earning spouses are much more likely to already have medical coverage from their own employers or to be able to afford to purchase it if it is not so available; and that the cost to its employees should be kept as low as possible so that those who really need and deserve coverage can obtain it" (*ibid.*). The district court also held that petitioners had failed to show that the head-of-household rule was adopted for discriminatory reasons (*id.* at 5C).

The court of appeals affirmed (Pet. App. 1A-8A; 705 F.2d 1492). It held (Pet. App. 6A) that respondent had shown the following "legitimate and overriding business justifications" for the head-of-household rule:

> [Respondent] explains that the rule is designed to benefit the largest number of employees and those with

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[2]Respondent pays 75% of the cost of the health insurance it provides to its employees; the employees contribute 25% (Pet. App. 2A). The district court stated that respondent currently pays $50 million for employee health insurance benefits and that if the head-of-household rule were eliminated, respondent's "contribution to [the] increased costs would amount to from three to five million dollars a year" (Pet. App. 3C).

> the greatest need. It concluded that * * * spouses covered under the head-of-household rule have the greatest need for dependent coverage. Qualifying spouses are less likely to have other medical insurance. It seeks to keep the cost of the plan to its employees as low as possible, so that the needy can afford coverage. If all spouses are included, the contribution rates will increase.

The court of appeals also held that the district court was not clearly erroneous in concluding that the head-of-household rule was not adopted intentionally to discriminate against women (*id.* at 7A).

DISCUSSION

1. Ordinarily a plaintiff in a Title VII action may seek relief on the basis of either a claim of "disparate treatment" — that is, intentional discrimination — or "disparate impact." See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). Petitioners have not pursued their disparate treatment claim in this Court. The court of appeals, after stating that disparate impact analysis applies to respondent's head-of-household rule (Pet. App 4A), analyzed the case according to a disparate impact standard.

The logically first question is whether disparate impact analysis properly applies to petitioners' claim at all and, if so, in what form. This is an important and unresolved question, but we do not believe this case presents this Court with an appropriate vehicle for its resolution. In particular, in the specific category of Title VII suit involved here — a suit alleging sex discrimination in compensation — the Bennett Amendment to Title VII, the last sentence of 42 U.S.C. 2000e-2(h), makes available to an employer the affirmative defenses that are available under the Equal Pay

Act of 1963, 29 U.S.C. 206(d). See *County of Washington* v. *Gunther*, 452 U.S. 161 (1981). One of those defenses is that a pay differential may be based on "any other factor other than sex." Whether, and under what standards, the Bennett Amendment changes otherwise applicable Title VII analysis is an important question that this Court has not yet addressed. See *id.* at 170-171. See also *Kouba* v. *Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982).

It appears, however, that this question is not presented by this case. The district court's first opinion does use the phrase "factor other than sex" (*e.g.*, Pet. App. 8E) — which is the language from the Equal Pay Act that is incorporated in Title VII by the Bennett Amendment — but the district court did not expressly rely on the Bennett Amendment. The court of appeals' decision does not mention or rely on the Bennett Amendment. And so far as we are able to ascertain from the record, respondent did not raise this affirmative defense in its answer or preserve it on appeal. Since the issue was not explored below and probably cannot now be raised by respondent, this case does not provide an appropriate vehicle for the resolution of the question whether, and to what extent, the Bennett Amendment precludes the application of disparate impact analysis to claims of sex discrimination in compensation.

There is a distinct question, which this Court appears to have left open, whether under Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2(a)(1), "disparate-impact analysis applies to fringe benefits" at all (*Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 711 n.20 (1978); see *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 144-145 (1977)).[3] Respondent does appear to have presented this argument to

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[3]Unlike the Bennett Amendment, this defense, if it exists, would apparently apply to claims based on all forms of discrimination that are unlawful under Title VII, not just sex discrimination.

the court of appeals on the first appeal (see Appellants' Opening Br. 12-21), although in its Brief in Opposition respondent does not attempt to defend the court of appeals' decision on this ground. Since the court of appeals ruled in favor of petitioners on this issue, this case similarly does not appear to be an appropriate one for the Court to review for the purpose of addressing this question.

2. We turn, therefore, to the ground of decision in the court of appeals. Under disparate impact analysis, an employment practice that has "a significantly discriminatory impact" on a protected class (*Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982)) violates Title VII unless the employer carries the burden of showing that the practice is justified by a "business necessity" (*Griggs* v. *Duke Power Co*, 401 U.S. 424, 431 (1971)). See also *Satty*, 434 U.S. at 141-143; *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). Respondent's head of household rule has a severe disproportionate impact adverse to women; among respondent's employees, 90% of married men but only 12.5% of married women can obtain health insurance for their spouses. Cf. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, No. 82-411 (June 20, 1983), slip op. 13-15 & n.22. The court of appeals correctly held that the rule has a statistically significant disproportionate adverse effect on women, and it is unclear whether even respondent continues to deny that the rule has such an impact. Under disparate impact analysis, therefore, the only question is whether respondent has demonstrated that the rule is justified by a "business necessity."

Both respondent and the courts below rely principally on three factors in support of the respondent's head-of-household rule: (a) cost, (b) the extent to which the rule benefits employees "who have the greatest need," and (c) the desire to limit spousal coverage to spouses less likely to be covered by their own employers' health insurance programs. But respondent failed to show that the

head-of-household rule adequately served these interests to sustain a business necessity justification. Rather, the lower courts simply observed that they were respondent's asserted justifications, and then "conclude[d] that these are legitimate and overriding business justifications for the head-of-household rule." (Pet. App. 6A).[4]

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[4]The Equal Employment Opportunity Commission has issued a guideline condemning head-of-household rules as presumptively unlawful under Title VII. 29 C.F.R. 1604.9(c). The Department of Labor, when it was responsible for enforcing the Equal Pay Act, 29 U.S.C. 206(d), issued a similar regulation, interpreting that statute, which is of relevance to Title VII litigation (see pages 4-5, *supra*):

> Sometimes differentials in pay to employees performing equal work are said to be based on the fact that one employee is head of a household and the other, of the opposite sex, is not. In general, such allegations have not been substantiated. Experience indicates that where such factor is claimed the wage differentials tend to be paid to employees of one sex only, regardless of the fact that employees of the opposite sex may bear equal or greater financial responsibility as head of a household or for the support of parents or other family dependents. Accordingly, since the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a "head of household" or "head of family" status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the Administrator [of the Wage and Hour Division, Employment Standards Administration, of the Department of Labor] is that they are not prepared to conclude that any differential allegedly based on such status is based on a "factor other than sex" within the intent of the [Equal Pay Act].

29 C.F.R. 800.149. The EEOC has proposed a similar regulation interpreting the "factor other than sex" defense of the Equal Pay Act to exclude head-of-household rules. 46 Fed. Reg. 43852 (1981).

Neither the guideline nor the regulations specifically address the business necessity issue that was the basis of the ruling of the court of appeals.

We note, in addition, that these guidelines and regulations — and the question presented by this case — are distinct from "the controversial concept of 'comparable worth,' under which plaintiffs might claim

a. The simple fact that additional cost would be incurred if respondent abandoned its head-of-household rule is insufficient justification for retention of that rule. Otherwise, any rule having disparate impact could satisfy the business necessity standard. Additional costs would be incurred if respondent simply extended its existing health insurance plan to the spouses of all employees who sought such benefits. But this would not be the only option available if the head-of-household rule were invalidated. An employer could, if it chose, provide a different, less costly package of health insurance benefits to all spouses (or to all employees), thereby offsetting the cost of extending benefits to the spouses of employees who are not heads of households. In other words, this case concerns not the total cost of respondent's health insurance plan but the way in which the benefits of that plan are distributed among respondent's employees; respondent is free to provide health insurance that has the same overall cost as its current plan, so long as it does not distribute benefits in a way that greatly favors male employees but is not justified by a business necessity. See generally *Liberles* v. *County of Cook*, 709 F.2d 1122, 1132-1133 (7th Cir. 1983).

b. Neither is it obvious that respondent's head-of-household rule gives greater benefits to employees who "have the greatest need" (Br. in Opp. 3) or who are the most worthy "objects of [respondent's] concern and its bounty" (Pet. App. 3C). If respondent's objective was to funnel

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increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community" (*Gunther*, 452 U.S. at 166 (footnotes omitted)). Respondent does not claim, and cannot plausibly claim, that its head-of-household rule is based on " 'a bona fide job rating system' " (109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell), quoted in *Gunther*, 452 U.S. at 171; see *id.* at 170-171 n.11; *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 199-201 (1974)); the head-of-household rule makes no reference to an employee's job.

benefits to the families of its less well-off or less well-paid employees, it could simply have provided increased benefits to employees, or employee families, earning less than a certain amount. The head-of-household rule does not function in this way; it permits families with high incomes to obtain spousal benefits (if the member of the family employed by respondent earns more than his spouse) while disqualifying families with low incomes (if the member of the family employed by respondent earns less than his spouse).

c. It seems doubtful that the head-of-household rule effectively confines health insurance coverage to spouses who are less likely to be able to obtain health insurance through their own employers. In any event, respondent has failed to show that the rule in fact serves this purpose. Respondent had the burden of proving that its rule is justified by a business necessity (see, *e.g.*, *Dothard*, 433 U.S. at 329 (quoting *Griggs*, 401 U.S. at 432)), and the court of appeals and the district court cited no evidence suggesting that the head-of-household rule accurately identifies the spouses who are likely to lack health insurance coverage of their own.[5] The courts below appear simply to have accepted respondent's assertions to this effect, instead of requiring respondent to prove its case.

For example, respondent and the courts below appear to assume that there is a rough correlation between a spouse's earned income and his ability to obtain health insurance through his employer. That correlation may exist, although it appears on this record that respondent has not carried its burden of proving the correlation. But as we have explained, it is not self-evident that the head-of-household rule takes

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[5] *Dothard* also clarifies that the plaintiff may prove, relevant to the business necessity issue, that other non-discriminatory alternatives are available to the employer. 433 U.S. at 329.

advantage of any such correlation; under that rule, some spouses with high incomes are eligible for respondent's health insurance (if they are married to employees with even higher incomes), and some spouses with low incomes are ineligible for respondent's health insurance (if they are married to employees with lower incomes). And the courts below cited no evidence suggesting that the respondent's head-of-household rule accurately identifies low-income spouses in the particular circumstances of this case.

In addition, under disparate impact analysis, even if respondent showed that its rule serves a business necessity, the "plaintiff may prevail, if he shows that the [defendant] was using the practice as a mere pretext for discrimination." *Connecticut* v. *Teal*, 457 U.S. 440, 447 (1982). In this regard, the plaintiff may also prove that "other selection devices without a similar discriminatory effect [that] would also 'serve the employer's legitimate interest' " (*Dothard*, 433 U.S. at 329, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975)).

The alternatives available to respondent were adverted to below, but they do not appear to have been the subject of proof or findings. For example, the proceedings below do not appear to have explored whether respondent could have dealt directly with the matter by adopting a straightforward rule that spouses who can obtain health insurance from their own employers are ineligible for coverage under respondent's plan. According to trade journals, other employers have adopted just such a rule. See *Coping With Inter-Company Cost Shifting*, 5 Benefits News Analysis 5,8 (Jan. 1983). Such a rule would promote respondent's asserted objective far more efficiently than the head-of-household rule.

In this case the district court found against the petitioners on the pretext issue, the court of appeals held that this determination was not clearly erroneous, and petitioners does not seek review of that determination.

3. For the foregoing reasons, the courts below failed to require proof of business necessity adequate to satisfy Title VII's standards. Whether this case warrants the Court's review is a much closer question. The court of appeals' failure to insist on an adequate demonstration of business necessity is inconsistent with the approach other courts of appeals have taken in applying disparate impact analysis under Title VII.[6] Because no other court of appeals has considered a head-of-household rule, however, there is no direct conflict among the circuits. While we cannot say that head-of-household rules are commonplace, respondent overstates the matter when it suggests (Br. in Opp. 7) that its rule is nearly unique; there is testimony in the record that other employers have similar rules (see Tr. 247-248, 310). The Equal Employment Opportunity Commission advises us that it has brought a suit, which is pending, challenging a similar rule used by the employer of 14,000 employees (*EEOC* v. *John Hancock Mutual Life Insurance Co.*, Civ. No. 75-39-35-MCN (D. Mass.)) and that charges involving three other employers with similar rules, whose practices

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[6]See, *e.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); *Liberles* v. *County of Cook*, 709 F.2d 1122, 1132 (7th Cir. 1983); *Hawkins* v. *Anheuser-Busch, Inc.*, 697 F.2d 810, 815-816 (8th Cir. 1983); *Rowe* v. *Cleveland Pneumatic Co.*, 690 F.2d 88, 93-94 (6th Cir. 1982); *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992, 1016-1017 (11th Cir. 1982); *Williams* v. *Colorado Springs, Colorado School District*, 641 F.2d 835, 840-842 (10th Cir. 1981); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1376-1378 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 245-247 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

potentially affect more than 2,000 employees, are pending before the Commission.

The Commission has also brought suit against respondent itself under Title VII in the United States District Court for the Eastern District of Michigan, seeking damages and a nationwide injunction against the operation of the head-of-household rule. Should the Commission prevail in that litigation, the particular rule that is at issue here will be modified. In that case, the district court has dismissed the disparate impact claim and the case will soon be tried on the theory that respondent adopted the head-of-household rule for discriminatory reasons. If, as we believe likely, the Commission is able to prove in that case that the rule amounts to a purposefully discriminatory device to perpetuate respondent's prior explicitly sex-based rule (see pages 1-2, *supra*), the question of the continuing validity of respondent's particular rule will be resolved on that basis.

Moreover, as we have noted, certain factual issues relevant to the business necessity defense were not meaningfully explored in this case, making it an imperfect vehicle for resolving the business necessity issue. Perhaps most important, the question whether, or in what way, disparate impact analysis applies to claims of sex discrimination in compensation (or perhaps to any claims involving fringe benefits) is, as we noted, not yet resolved, and it appears that this question should not be resolved in this case. The court of appeals' application of the business necessity test, while erroneous, appears as a practical matter to affect only claims of sex discrimination in compensation — the very category of claims covered by the Bennett Amendment. Should this Court ultimately determine that disparate

impact analysis is inappropriate or requires modification in this area, the prospective significance of the court of appeals' decision would be limited.

Respectfully submitted.

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